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No. 93-992

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BARTOLOME E. ABUAN, *et al.*,
Petitioners,

v.

GENERAL ELECTRIC COMPANY and
MONSANTO COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the law of Guam, the plaintiffs submitted evidence of sufficient exposure to a toxic substance to prevent summary judgment against them on their common-law claims for increased risk of future injury and for future medical monitoring?

RULE 29.1 STATEMENT

Pursuant to rule 29.1 of the Rules of the Supreme Court of the United States, Respondents General Electric Company and Monsanto Company hereby identify all parent companies and subsidiaries (except wholly-owned subsidiaries) that have issued shares to the public.

General Electric Company has no parent corporation. General Electric Company has a number of subsidiaries in the United States and elsewhere, but only a limited number of these subsidiaries have any outstanding equity or debt securities that are publicly held. These are: GECC Financial Corporation; General Electric Capital Corporation (formerly General Electric Credit Corporation); General Electric Capital Canada, Inc.; General Electric Credit International, N.V.; General Electric Capital Services, Inc. (formerly General Electric Financial Services, Inc.); Montgomery Ward & Co., Inc.; and CAMCO, Inc. (Canada). The public holdings of GECC Financial Corporation, General Electric Capital Canada, Inc., General Electric Credit International, N.V., General Electric Capital Services, Inc., and Montgomery Ward & Co., Inc. are limited to debt seuurities. General Electric Company itself has common stock and debt securities that are publicly traded.

Monsanto Company has no publicly-owned parent company. The following five Monsanto Company subsidiaries have issued shares to the public: Southwell Technologies, Inc.; the Macneal-Schwendler Corp.; Micro General Corp.; Dura Pharmaceuticals; and Microfluidics.

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT [1]

This case arises out of the pressurized release on May 25, 1987 of about eight gallons of liquid polychlorinated biphenyls—"PCBs"—from the junction box of a forty-year-old electric transformer at the Piti Power Plant on the Navy base on Guam. The incident itself was relatively unremarkable: no one was injured at the time of the release, and no one has sustained any injuries subsequent to that date as a result.

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[1] In lieu of a "Statement of the Case," Respondents adopt the statement of facts contained in the opinion of the Ninth Circuit. *Abuan v. General Elec. Co.*, 3 F.3d 329 (9th Cir. 1993).

The petitioners in this Court (hereafter referred to as the plaintiffs) sought and received public funds from the Legislature of Guam to finance litigation against the United States Navy (whom the plaintiffs believed had failed to adhere to proper procedures in conducting the clean-up), General Electric (the manufacturer of the transformer), and Monsanto Company (the manufacturer of the PCBs).[2] Yet after more than two years of blood tests, expert reports, and other discovery, they still could not provide legally sufficient evidence that a single person had, as a result of the incident, received a dose of PCBs sufficient to require future medical monitoring or create an increased risk of future illness or injury. The District Court so held, and the Ninth Circuit unanimously affirmed. *Abuan v. General Elec. Co.*, 3 F.3d 329 (9th Cir. 1993).

The plaintiffs apparently want the Supreme Court of the United States to repeat this sifting of evidence, but that is not a proper task for this Court. Moreover, none of the factors that make certiorari appropriate, listed in Supreme Court Rule 10.1, are present in this case. Accordingly, the petition should be denied.

I. THE DECISION OF THE NINTH CIRCUIT WAS STRICTLY EVIDENTIARY, AND IS THEREFORE INAPPROPRIATE FOR THIS COURT'S REVIEW.

The Ninth Circuit affirmed the District Court's grant of summary judgment on the first of two grounds offered by the District Court: that the plaintiffs had failed to introduce evidence sufficient to demonstrate that any plaintiff had been exposed to a level of PCBs that could possibly cause the future health effects for which the plaintiffs were trying to recover in advance.[3] Thus, granting a writ of

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[2] The U.S. Navy was sued separately, in a case captioned *Figueroa v. United States*, following the denial of the plaintiffs' administrative claims.

[3] The District Court also held that summary judgment was appropriate because the plaintiffs had failed to prove any present, physi-

certiorari would require this Court to sift the evidence already reviewed by both lower courts in order to determine whether they erred in finding that the plaintiffs' evidence failed to raise a genuine issue of material fact. That is rarely an appropriate task for this Court's attention. Indeed, this Court has stated that it will not usually grant certiorari for this purpose, and there is no compelling reason to depart from that longstanding practice here. *See, e.g., United States v. Johnston,* 268 U.S. 220, 227 (1925). "A court of law, such as this Court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

II. THE CONSIDERATIONS THAT USUALLY SUPPORT CERTIORARI ARE ABSENT HERE.

Rule 10.1 of the Rules of the Supreme Court of the United States sets forth the considerations this Court weighs in granting or denying certiorari. From among these considerations, the plaintiffs have suggested that the decision of the Ninth Circuit "conflicts directly with other courts of appeals on the same issues, prior decision of the Supreme Court of the United States as well as the Federal Rules of Evidence." Petition for Writ of Certiorari at 16. However, the Ninth Circuit's decision creates none of

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cal injury, and such proof was essential under the common law of Guam. The Ninth Circuit did not address this ground for summary judgment because it found the evidence would be insufficient even if the plaintiffs were permitted to proceed in the absence of present, physical injury. *Abuan v. General Elec. Co.,* 3 F.3d 329, 331 n.3 (9th Cir. 1933). Both the District Court and the Court of Appeals also held that the plaintiffs had failed to submit evidence sufficient to invoke Guam's Toxic Substances Exposure Compensation Act, but the plaintiffs do not seek review of that portion of the case in this Court.

these conflicts; indeed, it does not involve any question of federal law.

The plaintiffs' petition is not entirely clear about the source of the supposed conflict with other federal courts of appeals, but the most prominent candidate is *Brown v. Monsanto Co. (In re Paoli R.R. Yard PCB Litigation)*, 916 F.2d 829 (3d Cir. 1990), *cert. denied sub nom. General Elec. Co. v. Knight*, 499 U.S. 961 (1991). *See* Petition for Writ of Certiorari at 23-26. Yet *Paoli* concerned the *admissibility* of expert testimony, not its *sufficiency*. This distinction is crucial. In moving for summary judgment below, the defendants did not even address admissibility. Instead, we pointed out that the plaintiffs' own experts steadfastly refused to relate the level of each plaintiff's alleged exposure to *any* meaningful standard, thus rendering the testimony insufficient under the substantive law *even if it were admissible*. After reviewing the testimony, the Ninth Circuit agreed, and it even cited *Paoli* before concluding that the evidence in this case "failed to meet the *Paoli* significance standard." 3 F.3d at 334-35.[4]

For the very same reason, the Ninth Circuit's decision does not conflict with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the only decision of this Court cited by the plaintiffs. This case simply does not involve the admissibility of expert testimony. Likewise, there is no conflict with rules 702 or 703 of the Federal Rules of Evidence, which are nowhere referenced in the opinion of the Court of Appeals.

Finally, the Ninth Circuit did not decide any important question of federal law. Rather, the Ninth Circuit applied the common law of Guam, and acknowledged that it was

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[4] To the extent that the supposed conflict is between the Ninth Circuit's opinion here and the opinions of other courts of appeals in other cases alleging exposure to toxic substances, any differences among the circuits merely reflect differences in the substantive tort law of the jurisdictions whose law was being applied by the federal courts.

doing so in the absence of any reported Guam cases on point. 3 F.3d at 332. Nothing in the plaintiffs' petition suggests that the lower courts' interpretations of Guam law were legally erroneous in any respect, or that the lower courts stubbornly refused to defer to local law; those courts simply failed to incorporate the plaintiffs' policy preferences into the substantive law of Guam. Where local law is itself uncertain, this Court has been strongly reluctant to review the reasonable interpretations reached by the intermediate federal appellate courts. *See* R. STERN, E. GRESSMAN, S. SHAPIRO, AND K. GELLER, SUPREME COURT PRACTICE 183 (7th ed. 1993).

CONCLUSION

The sufficiency of the plaintiffs' evidence under the common law of Guam is a fact-intensive question; it is a question of local tort law; and it is a question which the Ninth Circuit resolved correctly and in a manner that was in no way inconsistent with decisions of this Court or the courts of appeals. In short, it is not an appropriate question for this Court's attention. The writ should be denied.

Respectfully submitted,

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